SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 1277

LOUIE L. WAINWRIGHT, Director
Division of Corrections,

Petitioner,

vs.

FREDERICK KEITH CALLOWAY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit entered in the case of Frederick Keith Calloway, Appellant, v. Louie L. Wainwright, Appellee, Case No. 25284, on December 20, 1968, as modified on rehearing granted February 19, 1969.

OPINIONS BELOW

The Opinion of the Florida Supreme Court affirming respondent's conviction is reported at 189 So.2d 617. No other opinions have presently been published. The opinion of the United States District Court denying Petition for Habeas Corpus, and the opinion of the Fifth Circuit, and order on rehearing, may be found in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), in view of the importance of the question decided by the United States Court of Appeals for the Fifth Circuit, the conflict between the decision of the Fifth Circuit and that of the Ninth Circuit in **Dyson v. United States** (9th Cir. 1960) 283 F.2d 636, and the fact that the Fifth Circuit decided this case contrary to State law as reflected in **State v. Hines** (Fla. 1967) 195 So.2d 550 and **Odom v. State** (Fla. 1959) 109 So.2d 163.

QUESTION PRESENTED

WHETHER A LIMITED WAIVER OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IS CONSTITUTIONALLY COMPELLED WHERE THE DEFENDANT TAKES THE STAND IN THE PRESENCE OF THE JURY FOR THE PURPOSE OF CHALLENGING THE VOLUNTARINESS OF HIS CONFESSION AND TESTIFIES THAT HE DENIED GUILT TO AN INTERROGATING OFFICER.

CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein is that part of the Fifth Amendment to the Constitution of the United States which provides as follows:

> "... nor shall be compelled in any criminal case to be a witness against himself ...."

and which has been made applicable to the States through the Fourteenth Amendment, **Griffin v. California** (1965) 380 US 609, reh. den. 381 US 957, **Malloy v. Hogan** 378 US 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964). As respondent's case was pending on appeal at the time, he is entitled to the benefit of **Griffin v. California**, supra.

STATEMENT OF THE CASE.

Carl Ludwig, Jr., was found dead of bullet wounds to his head in Ft. Lauderdale, Broward County, Florida, on September 26, 1964. Respondent was arrested and charged with that crime (A72-3). Respondent requested an attorney at his home where he was arrested (A84,95), and at the scene of the crime where he was taken right after his arrest (A19,95-6,109). When the officers and the accused arrived at the Broward County Sheriff's Office and before the accused made any statement, he was told that he had the right to use the telephone. There was a telephone (A21) and a telephone directory in the room (A110-111) where he was left alone for four or five minutes (B324). When told he could use the telephone, he indicated by a shrug of his shoulders that he did not want to make a call and also said he would like to give a statement (A118).

At the time of respondent's arrest, he knew a lawyer and was paying him for getting a divorce for the woman with whom he was living (E627).

On a Motion to Suppress the Confession, held outside the presence of the jury, the trial Judge found that the confession was voluntary and ordered that it would be admitted (A145). Respondent urged the trial Judge to cause all the testimony presented on the Motion to Suppress to be repeated before the jury. The trial Judge refused, requiring respondent to take the stand in his own behalf in order to challenge the voluntariness of his confession (D436-440). This he did (E621). Efforts to cross-examine him on other points were objected to as beyond the scope of direct examination and the objections were sustained (E660-681). In closing argument the prosecutor commented upon failure of the accused to testify as to other matters.

In the course of describing the method in which the confession was obtained from him, respondent testified that he had denied his guilt three times to the interrogating officers (E635).

The trial Judge instructed the jury that if they found respondent's confession to be involuntary, because induced by threats, promises or inducements, they should disregard it entirely (F905).

Respondent was convicted of murder in the first degree without recommendation of mercy and was sentenced to death. His conviction was upheld by the Florida Supreme Court, which observed that he was entitled to have all evidence regarding the confession repeated before the jury. The Court noted that was accomplished in his case even though he had to wait to present his side until his own case.

On Petition for Rehearing, respondent alleged that his rights under **Griffin v. California**, supra, were violated in this procedure. Rehearing was denied.

The United States District Court for the Southern District of Florida denied Petition for Writ of Habeas Corpus, holding that failure to permit the obtaining of counsel when respondent requested same did not invalidate his confession since he was afforded the opportunity to obtain counsel and declined it prior to any interrogation and holding that his privilege against self-incrimination had not been violated where he had taken the stand in his own behalf and had placed his denial of guilt before the jury.

The United States Court of Appeals for the Fifth Circuit upheld the determination that respondent's confessions were not involuntary but concluded that he should have been permitted a limited waiver of his privilege against self-incrimination where he sought to take the stand solely to challenge the voluntariness of his confession. The Fifth Circuit also held that the sentence of death constituted a violation of this Court's decision in **Witherspoon v. Illinois** (1968) 391 US 510, 20 L.Ed.2d 776, 88 S.Ct. 1770, but struck all references to that ground on rehearing granted.

ARGUMENT

A LIMITED WAIVER OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT CONSTITUTIONALLY COMPELLED WHERE THE DEFENDANT TAKES THE STAND IN THE PRESENCE OF THE JURY FOR THE PURPOSE OF CHALLENGING THE VOLUNTARINESS OF HIS CONFESSION AND TESTIFIES THAT HE DENIED GUILT TO AN INTERROGATING OFFICER.

Petitioner believes that the importance of the question presented can best be seen in the following perspective: The Court of Appeals for the Fifth Circuit held that if the accused wishes to testify before the jury solely to challenge the voluntariness of his confession, that he should be permitted to do so without thereby fully waiving his privilege against self-incrimination. However, voluntariness had already been determined by the trial Judge in accordance with this Court's decision in **Jackson v. Denno** (1964) 378 US 368, 12 L.Ed.2d 908, 84

S.Ct. 1774. Thus his confession was admissible in just the same fashion as any other evidence properly admitted in the State's case. By logical extension of the decision of the Fifth Circuit a defendant should be able to pick and choose which evidence introduced by the State he will challenge—all without waiving his privilege against self-incrimination.

Petitioner believes that respondent's challenge to the voluntariness of his confession made before the jury at time of trial, was nothing more than a challenge to the weight and sufficiency of the evidence in the State's case. Petitioner can see no valid reason for distinguishing between a challenge to a confession and a challenge to other evidence introduced by the State. Petitioner respectfully submits that any such challenge to the weight and sufficiency of the State's case made before the jury, necessarily results in a waiver of the privilege against self-incrimination.

The Fifth Circuit held that the challenge to the voluntariness of the confession was a collateral matter. It nonetheless afforded respondent the opportunity to deny his guilt in the presence of the jury. He was quick to take advantage of it, stating three times that he had told the interrogating officer that he did not do it.

The right to cross examine witnesses is vital to the prosecution as well as to the defense. The importance of this right to the defense has been recognized by this Court repeatedly in decisions such as **Pointer v. Texas** (1965) 380 US 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065, **Bruton v. United States** (1968) 391 US 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, and **Barber v. Page** (1968) 390 US 719, 20 L.Ed.2d 255, 88 S.Ct. 1318.

But the prosecution should also have that right. The inability to cross examine effectively concerning the denial of guilt is especially important in a case such as that at bar, because the denial of guilt made to the police officer is a self-serving declaration and is highly unreliable when followed by a voluntary confession. If the accused can deny his guilt in a collateral form, and still limit his waiver of the privilege against self-incrimination, the prosecution can neither cross examine effectively on the issue of guilt nor use the unwillingness of the accused to answer broader questions against him.

The Fifth Circuit believes that a full story of the confession can only be told by including any denials made to police officers. However, the real question is not whether the full story of the confession can be told without including details of any denials of guilt. The question is whether said denials of guilt exceed any proper bounds for a limited waiver to occur. On this point, the decision of the Fifth Circuit conflicts directly with the decision of the Ninth Circuit in **Dyson v. United States** (9th Cir. 1960) 283 F.2d 636. The cases are factually indistinguishable on this point.

Because of the importance of the question presented, and because of the conflict between the instant decision and the decision of the Ninth Circuit in **Dyson v. United States,** supra, it is respectfully submitted that this Court should take jurisdiction.

The petitioner also believes that this Court should take jurisdiction because the Fifth Circuit has decided this case in a manner inconsistent with State law. The Fifth Circuit did not believe that the State law was settled as to whether a limited waiver could be obtained in a case such as this. The Court noted that the trial Judge limited cross examination by the State to the matter which had been testified to by respondent. The Fifth Circuit thought this indicated a view that a limited waiver had occurred. However, that same trial Judge required the accused to present his side of the story during his case.

Petitioner submits that the law of the State of Florida is well settled concerning the issue of limited waiver. In **Odom v. State** (Fla. 1959) 109 So.2d 1963, the Supreme Court of Florida observed as follows:

> "Whether or not a defendant becomes a witness for himself is purely a question for decision by him. If he elects not to testify, he is to be classified as a silent defendant whose silence must be ignored, except in some unusual circumstance such as was present in **Waid v. State**, supra. But if he decides to do so, he is then to be regarded as any other witness, his testimony will be weighed the same as that of any other witness and the jury may in evaluating it take into consideration his interest in the trial and its result. And argument directed to what he says and does not say will be completely justified." **Odom v. State**, supra, at 165.

In the Odom case, the accused took the stand and testified only as to personal matters upon which his attorney based a plea of mercy. Odom had made no effort in his testimony to deny his guilt of the crime charged. Clearly, Florida does not recognize any right to a limited waiver of the privilege against self-incrimination.

Equally in point is **State v. Hines** (Fla. 1967) 195 So.2d 550. That decision specifically overruled the prior cases which held that where the accused took the stand during his trial, the prosecution could not comment on his failure to testify in other judicial proceedings, such as former trials or preliminary proceedings, though the Court reserved the question of whether a limited waiver might be applied to certain special circumstances, as when the accused testifies before the judge concerning a confession.

CONCLUSION

As the decision of the Fifth Circuit passes upon a very important question, and conflicts with both the Ninth Circuit and Florida law on the same issue, it is respectfully submitted that this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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By _____
CHARLES W. MUSGROVE
Assistant Attorney General
321 Pan-A Building
West Palm Beach, Florida
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, has been furnished to Honorable Leonard Fleet, Attorney for respondent, 1940 Harrison Street, Hollywood, Florida, this _____ day of April, 1969.

CHARLES W. MUSGROVE
of Counsel

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 67-206-CIV-EC

FREDERICK KEITH CALLOWAY,
Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Director, Division of Corrections,
Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

"The homicide was plainly premeditated and, we might add, senseless. The appellant drove to a store where the victim 18 years of age was working. He called the youth out to his car and at gun point demanded the currency in the place. The boy obliged by producing $120. and when he did so the appellant ordered him into the car, took him to a relatively secluded spot and told him to lie down, whereupon he put four bullets into the youngster's head. The only motive for the cruel act was given by a woman with whom appellant had an illicit relationship. She quoted him as saying 'I don't like eyewitnesses.'" **Calloway v. State**, 189 So.2d 617, 621 (Fla. 1966).

These are the basic facts of the crime, as stated by the Supreme Court of Florida and fully supported in the record.

This cause came on before this court upon the petition of Frederick Keith Calloway for a writ of habeas corpus. The Attorney General responded, and pursuant to order of this court a pre-trial conference was held. At the pre-trial hearing, and by written stipulation, the parties agreed that the court would inquire into petitioner's allegedly unconstitutional detention by examining the pleadings, the entire record of the trial[1] and appellate proceedings in this cause, and the briefs of the parties. See **Holman v. Washington**, 364 F.2d 618, 620 n.2 (5th Cir. 1966). The parties further agreed that there are four issues to be determined, as set forth in this court's order of March 10, 1967, directing a response to the petition.

I. ASSISTANCE OF COUNSEL

The first issue with which the court will deal is the allegation that the arresting officers denied petitioner's repeated requests to consult with a lawyer, which requests were made after his arrest and before any incriminating statements were made.

The facts on this issue, which are stated in the opinion of the Supreme Court of Florida, 189 So.2d at 618-19, will not be repeated here. It is admitted that petitioner requested an attorney at his home where he was arrested, and at the scene of the crime where he was taken right after his arrest. When the officers and the accused

[1]The respondent has furnished the court with all the transcripts of testimony from the state proceedings, which have been labeled A through G. References to pertinent testimony will be made by volume letter and page number of the particular volume. Volume A is the transcript of hearing on a motion to suppress. The other volumes are transcripts of trial testimony.

arrived at the Broward County Sheriff's office, and before the accused made any statement, he was told he had a right to use the telephone. There was a telephone and a telephone directory in the room where petitioner was. He was left alone in the room for four to five minutes. When told that he could use the telephone, he said, indicated by a shrug of his shoulders, that he did not want to make a call, and also said he would like to give a statement. A - 109, 118, 121: C - 324, 326.

At the time of petitioner's arrest, he knew a lawyer, and was paying him for getting a divorce for the woman with whom petitioner was living. E - 627. Petitioner apparently did not call any lawyer at the time in question, although he was given an opportunity to do so, and was advised that he had a right to do so.

Therefore, the court finds that petitioner was not denied the assistance of counsel under **Escobedo v. Illinois**, 378 U.S. 478 (1964).[2]

II. VOLUNTARINESS OF CONFESSION

Petitioner contends that his confession was illegally obtained and used at trial.[3]

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[2]Because petitioner was tried in January of 1965, the *Escobedo* case applies, but the case of *Miranda v. Arizona*, 384 U.S. 436 (1966) does not apply, except for the explanatory footnote at page 444. *Johnson v. New Jersey*, 384 U.S. 719 (1966).

[3]Petitioner also complains of the use at trial of the evidence obtained through his confession. Since the court holds that the confession was admissible, it is unnecessary to decide whether evidence obtained through an involuntary confession is admissible.

At the time of his arrest and again at the sheriff's office, before he made any inculpatory statement, petitioner was told that any comment he made could be used either for or against him in a court of law. He was advised that he did not have to make any statement if he did not want to. C - 321, 325; D - 451-53. Calloway broke down and started to weep, and one of the detectives asked him "Do you have something to tell us, do you have something on your mind?" C - 324. According to the testimony of Detective Clode:

> "He advised us that if he told us what he had done it would kill his father, and it was quite a long period, maybe ten or fifteen minutes, where he just sat quiet and cried a little bit, and then he finally said, 'All right. I will tell you about it.' And he did." D - 451.

There is no credible evidence of coercion or undue influence upon the petitioner to the extent that his "will was overborne." **Reck v. Pate**, 367 U.S. 433, 440 (1961). The main conflict in testimony was over the issue of the promise of escape from the electric chair allegedly made in return for petitioner's confession. Petitioner's Brief on Rule to Show Cause, page 5. The court finds that no such promise was made, and that the confession was voluntary.

The court also finds that the procedure whereby the confession was introduced into evidence did not violate any constitutional right, for the reasons stated in the opinion of the Supreme Court of Florida, in this case. **Calloway v. State**, 189 So.2d 617, 619 (Fla. 1966).

III. CONSIDERATION OF CONFESSION ISSUE BY SUPREME COURT OF FLORIDA

A related issue is petitioner's allegation that the Supreme Court of Florida refused to consider the voluntariness of his confession. Inherent in the factual statement in that court's opinion, and in its affirmance of the conviction is the consideration of this issue. Moreover, this court has reviewed the record thoroughly and found the confession to be voluntary.

IV. COMMENT BY PROSECUTION

The last ground to be considered is that the prosecution commented upon petitioner's failure to testify in his own behalf, except to repudiate his confession. The court finds that the prosecution attorney did comment adversely upon petitioner's failure to testify in his own behalf on subjects other than the voluntariness of the confession. However, the petitioner's testimony on the stand went beyond the issue of the voluntariness of his confession. His answers to his attorney's questions on direct examination put before the jury his denial of his guilt of the crime. At least three times he testified that he had told the detectives, "I don't do it." E - 635. Where a defendant voluntarily testifies on the merits, not just upon a purely collateral matter, and fails to deny or explain incriminating facts already in evidence, such failure may be commented upon by the prosecution. **Dyson v. United States,** 283 F.2d 636 (9th Cir. 1960), **cert. denied,** 366 U.S. 974 (1961); **Carminetti v. United States,** 242 U.S. 470, 493-94 (1917); **State v. Fioravanti,** 46 N.J. 109, 215 A.2d 16 (1965), **cert. denied,** 384 U.S. 919 (1966).

CONCLUSION

Like every capital case, this is one of serious moment. The court has carefully considered each of petitioner's contentions in light of its constitutional obligations to the petitioner, the state and the nation. **Taylor v. Alabama,** 335 U.S. 252, 264 (1948). No constitutional infirmity appears in petitioner's conviction, either upon the grounds relied upon or from the record, which the court has examined in detail.

The interest of society in general, and of the bereaved family of the innocent victim in particular, demand that the obviously guilty perpetrator of this heinous crime be punished according to law. This court will not take upon its hands the blood of that victim by setting his murderer free.[4]

The highest court in the state has conscientiously found that Calloway "was justly convicted." 189 So.2d at 621. This court, in reluctantly performing the duties of a super appellate court, imposed by the decisions of higher federal courts, also finds that Calloway was justly convicted.

The petition for the writ of habeas corpus is denied.

DONE and ORDERED at Miami, Florida, this 12th day of July, 1967.

EMETT C. CHOATE

Senior United States
District Judge

cc: Louie L. Wainwright, Director, Division of Corrections
Honorable Earl Faircloth, Attorney General
Fred T. Gallagher, Assistant Attorney General
J. Leonard Fleet, Esq.
Frederick Keith Calloway

[4]The court is aware that it has the power to grant new trials in habeas corpus cases. But the court is also aware that this procedure often results in freeing a person that is obviously guilty.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 25284

FREDERICK KEITH CALLOWAY,

Appellant,

vs.

LOUIE L. WAINWRIGHT, Director, Division of Corrections,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(December 20, 1968)

Before BROWN, Chief Judge, *CLAYTON, Circuit Judge, and SCOTT, District Judge.

SCOTT, District Judge: Appellant, who was sentenced to death in the electric chair on January 15, 1965, for murder in the first degree, seeks habeas relief from that conviction and sentence. After conviction in Brow-

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*Judge Clayton heard oral argument but on account of illness was unable to participate in the consideration or decision of this case.

ard County, Florida, upon a jury verdict, appellant sought relief in the Circuit Court by motion for a new trial, by direct appeal to the Supreme Court of Florida and by petition for rehearing in the latter Court, all of which were denied. He then filed his petition for writ of habeas corpus in the United States District Court for the Southern District of Florida. The District Judge, on the basis of the record before the Court and a written stipulation from the pre-trial hearing, denied the relief sought. Both points raised on appeal have been argued in the Supreme Court of Florida by appeal or on petition for rehearing.

Appellant alleges two grounds of error for our consideration: First, that his conviction is constitutionally void because his repeated requests for the assistance of counsel prior to his confession were denied and his incriminating statement and all the evidence thereby obtained were admitted against him at his trial contrary to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; second, that the prosecutor commented to the jury about his failure to testify on matters other than the voluntariness of his confession contrary to the Fifth and Fourteenth Amendments.

We have added a third ground of error for consideration: Whether the trial court complied with the requirements of *Witherspoon v. Illinois*, __ U. S. __ [No. 1015, June 3, 1968], which holds that a sentence of death cannot be carried out if veniremen were excluded from the jury imposing sentence simply because they had conscientious scruples against the infliction of capital punishment.

The first assignment of error raises the question whether, considering the totality of the circumstances from an independent examination of the whole record,

I.

the appellant's statements were voluntary. *Clewis v. Texas*, 386 U.S. 707, 87 S.Ct. 1338, 18 L.ed.2d 423 (1967); *Greenwald v. Wisconsin*, __ U.S. __, 88 S.Ct. __, 20 L.ed.2d 77 (1968).

Whether one accused of crime has waived his right to the assistance of counsel for his defense must depend in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.ed. 1461, 146 A.L.R. 357 (1938).

Invariably, as the Supreme Court has pointed out, in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the confessions. This case presents no exception. To resolve this evidentiary conflict a credibility determination must be made. Considering the undisputed facts, together with reasonable inferences from the testimony as set forth below, we are led to the inescapable conclusion that appellant's confession was not involuntary as a matter of law.

On September 30, 1964, Detectives Frank Troy and Richard Bryan, with other members of the Broward County Sheriff's office, went to the appellant's home for the purpose of arresting him and charging him with first degree murder in the slaying of Carl Ludwig, Jr. The intended arrest was to be made with the cooperation of Ruth Calloway, whom the appellant had identified as his wife. Troy and Bryan stationed themselves inside appellant's home to await his arrival, and other law enforcement officers were placed so that the accused would be under constant observation.

When appellant opened the front door of his home, according to Troy, he was immediately placed under arrest and told that anything he said "at this time could be used either for or against him." According to Troy, on this occasion and on at least five other occasions prior to the time when appellant made any incriminating statements, he requested the opportunity to consult with counsel. Troy testified that appellant said he would not talk until he saw his lawyer. Appellant testified that he immediately asked for an attorney and that Troy told him "you have plenty of time for a lawyer."

Appellant was taken to the scene of the crime immediately after his arrest where he again requested an attorney. Detective Troy testified that not until appellant arrived at the Sheriff's office, located in the Broward County Court House, was he given the opportunity to contact an attorney. Appellant was placed in the interrogation room where he was told that he could make a telephone call. In the room with appellant was a telephone and a telephone directory. According to the testimony of Troy and Bryan appellant was left alone in the room for four or five minutes; this event is denied by appellant. Troy testified that when appellant was told that he could use the telephone he indicated by a shrug of his shoulders that he did not want to make a call and said that he would like to give a statement.

Shortly after the interrogation began appellant broke down and confessed. After the confession had been made orally appellant repeated the statement in the presence of other members of the Sheriff's office for the benefit of the typist who made a written record which was later signed by appellant and introduced at his trial as evidence for the State.

Appellant's trial began on January 11, 1965. This was after the Supreme Court had decided *Escobedo v. Illinois*, 378 U. S. 478, 84 S. Ct. 1758, 12 L. ed. 2d 977 (1964), and before that Court decided *Miranda v. Arizona* 384 U. S. 436, 86 S. Ct. 1602, 16 L. ed. 2d 694 (1964). The retroactive application of these two decisions are limited to trials begun after their respective dates of decision. *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772, 16 L. ed. 2d 882 (1966). Accordingly, the requirements of *Escobedo*, but not *Miranda*, directly apply to the matter *sub judice*. *Johnson v. New Jersey, supra*. However, the *Miranda* warnings are relevant to the issue of voluntariness, even though they are not directly applicable. *Clewis v. Texas, supra; Davis v. North Carolina*, 384 U. S. 737, 86 S. Ct. 1761, 16 L. ed. 2d 895 (1966).

It is quite clear that under *Gideon v. Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. ed. 2d 799, 93 A. L. R. 733 (1963), every person accused of a crime, whether State or Federal, is entitled to a lawyer at trial. This right to counsel was broadened under *Escobedo* to include the "in custody" period. In *Escobedo* the Supreme Court held that the rights described therein inured to the benefit of the accused when "the investigation is no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect . . . ." *Escobedo, supra*, at 490. Appellee argues that the appellant was not entitled to the rights under *Escobedo*. Clearly after appellant had been arrested and before confessing he was "in custody" and, therefore, entitled to the right to counsel under *Escobedo*. The process had turned from "investigatory to accusatory." See *Miranda, supra*, n. 4.

Under *Escobedo* the accused is denied assistance of counsel in violation of the Sixth Amendment when he is

in custody, has requested and been denied an opportunity to consult with his lawyer and has not effectively been warned of his absolute constitutional right to remain silent. Appellant makes no challenge here to the adequacy of the warnings given him of his right to remain silent, though on the stand he denied that the warnings were given to him. Crediting the testimony of the detectives, as did the District Court, there is no doubt that appellant was told that he had a right to remain silent.[1] Since it is undisputed

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[1]As to the warnings given the appellant immediately following his arrest, Deputy Sheriff Pinter testified as follows:

Q In your presence was the accused told that he didn't have to say a thing?

A Yes, sir; he was told that several times.

Q By whom?

A By Deputy Troy, I believe, by Deputy Clode.

Q Before or after the accused had made the first statement to Deputy Troy?

A Before.

Q How did you know?

A Well, I heard Deputy Troy tell him. . . .

Q Will you repeat for me the words used by Detective Troy?

A I really couldn't give it verbatim, but in effect he advised the defendant that he was under arrest for murder and he said, "At this time I want to advise you of your constitutional rights. If you want to make certain statements, anything you do say may be used for or against you in a court of law", something to that effect. . . .

Q Is that the time, too, Officer Troy advised Mr. Calloway of his constitutional rights which you have enumerated previously?

A Yes, sir.

Q That he had the right of having an attorney, counsel, anything he said might be used for or against him in court of jurisdiction or court of law in a subsequent hearing?

A Yes, sir.

Q Both of these things were said to him?

A Yes, sir.

Detective Troy testified:

Q Did you first advise him of his constitutional rights?

A Yes, sir. I advised him any statement he made at that time could be used for or against him in a court of law. I advised him he need not make any statement without first seeking advice of counsel. . . .

that appellant indicated at least several times that he was not going to say anything until he had talked to his lawyer, the question becomes whether appellant was afforded the opportunity to consult with a lawyer.

Appellant testified that at the time of his arrest he knew a lawyer and was paying him to obtain a divorce from the woman with whom he was living. He eventually called this very lawyer to aid in his defense. Though appellant was not given the opportunity to contact a lawyer until he arrived at the Broward County Sheriff's office, before appellant made any statements and again during interrogation he was repeatedly advised that he had a right to have an attorney. Apparently appellant changed his mind about obtaining counsel and shrugged his shoulders when he was advised that he could use a telephone located in the interrogation room.

This opportunity to contact a lawyer, limited as it was, together with the several warnings of his constitutional rights, was sufficient basis for the District Court's findings that appellant was not denied the assistance of counsel under *Escobedo* and the Fifth, Sixth and Fourteenth Amendments. Appellant had a fair opportunity to secure counsel of his own choosing within the guaranty of due process of the United States Constitution, Cf. *Crooker v. California*, 357 U.S. 433, 78 S. Ct. 1287, 2 L. ed. 2d 1448 (1958).

The inference is inescapable that appellant was ready and willing to confess of his own volition without first obtaining a lawyer. This Court will not substitute its own view on a close factual question for that of the State Court. Compare Mr. Justice Harlan's separate opinion in *Darwin v. Connecticut*, ____U. S.,——88 S. Ct. ——, 20 L. ed. 2d 630 (1968). We conclude that we cannot hold as a matter of law that there are sufficient facts which render the confession involuntary.

II.

The second assigned error raises the question whether the prosecutor's comments to the jury concerning appellant's failure to testify on anything other than the voluntariness of his confession violated the Fifth and Fourteenth Amendments to the United States Constitution. It is axiomatic that the Fifth Amendment is applicable to State prosecutions by the Fourteenth Amendment. *Mallory v. Hogan*, 378 U. S. 1, 84 S. Ct. 1489, 12 L. ed. 2d 653 (1964).

In the Circuit Court of Broward County, Florida, the Judge found that the confession was given voluntarily and that it was, therefore, admissible in evidence. *Calloway v. State*, 189 So. 2d 617 (Fla. 1966). The trial Judge would not let appellant relate to the jury his side of the story regarding the confession unless he took the stand during his case in chief. Appellant, therefore, elected to take the stand during the trial for the limited purpose of repudiating the voluntariness of his confession. Before taking the stand appellant's attorney announced to the Court that appellant was testifying only as to the manner in which the confession was obtained. During the course of his testimony appellant stated at least three times "I didn't do it".[2] When

[2]Upon direct questioning by his attorney, appellant related the conversation he had had with Detective Troy in the Broward County Court House on September 30, 1964, and the circumstances surrounding his confession. Appellant testified, in part, as follows:

> A . . . He [Troy] said, "Why don't you quit beating around the bush with me and tell me just what happened, just show me what you did. I said, "Detective Troy, I didn't do it. I know also for a crime of this type a person can be sentenced to the electric chair". I told him, "I may be stupid, but I am not ignorant. I am not that stupid". He said, "Well, look, if you tell me exactly how it was done, and if you tell me this I can promise you you will not get the electric chair". I said, "I didn't do it. I can't tell you I did it, I didn't do it". . . .

the prosecutor on cross-examination consistently sought to inquire of the appellant as to other matters the Circuit Judge sustained all objections thereto, apparently reasoning that appellant's "denial" before the jury had not violated the "limited purpose" for which appellant took the stand. When the States Attorney gave his closing argument to the jury, he repeatedly commented upon the failure of the accused to testify on other issues.[3] Objection to such comment was made by counsel for the defense. However, the Court *overruled* this objection and appellant contends that this ruling was reversible error.

Appellant was entitled under Florida law to have testimony concerning the admissibility of the confession repeated before the jury so that the jury might consider it

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[3]In his closing argument for the State, the prosecutor made the following statements to the jury:

> Mr. Long: . . . [the defendant] said several times, as you gentlemen will recall, "I want to know where Ruth and Rickey are". Keep in mind, gentlemen, that this is the same Ruth that he wouldn't tell the truth to[.] He didn't tell the truth then and never did tell the truth, and this is the same Ruth that he told he would kill Rickey, but the impression he wanted to make on you was the only interest he had was his girl, Ruth, and this same little boy that he told the mother, "I will kill him." Uncontradicted, he never once went back on September 30th. What happened the night of September 25th, objection sustained, it wasn't brought out on direct. The morning the 26th, the same thing, afternoon of the 26th, the same thing, and never once did he make a statement about what happened before September 30th, never once. Why? Because if he had ever gone into that, then we could have asked him where he was on the night of September 25th, we could have asked him, were you at the farm store, we could have asked him everything pertaining to this crime, but it went nicely, it wasn't gone into at all, — the mind of an innocent man? — oh no, the mind of a guilty person. Wants you to know what happened? Of course not! That is the last thing in the world we want to do is try the defendant, — anybody but me because I know I am guilty, says the defendant. Don't try me, because I know I am guilty, — try Troy. try Long, try anybody, but don't try me.

in determining how much weight should be accorded the confession. *Calloway, supra,* at 619; *Graham v. State,* 91 So. 2d 662 (Fla. 1956); *Bates v. State,* 79 Fla. 672, 84 So. 373 (1919). Part of this testimony was appellant's version of the circumstances and dialogue surrounding the making of the inculpatory statement.

Appellee contends that when appellant testified on his own behalf before the jury, he necessarily waived his constitutional privilege against self-incrimination with respect to his right not to have comment made upon his failure to testify as to other relevant matters in the case. Insofar as this precise point is concerned, it would appear that Florida has not ruled as to whether or not it will follow the law of limited waiver. However, we think that for the State to deny appellant a limited waiver of the "no comment" rule under circumstances presented here would be an infringement of the Fifth Amendment.

It is clear that when a defendant voluntarily testifies as to the merits, and not just upon a purely collateral matter, the prosecutor may comment upon the defendant's failure to deny or explain incriminating facts already in evidence. *Caminetti v. United States,* 242 U. S. 470, 492, 37 S. Ct. 192, 61 L. ed. 442, 456 (1916); *Dyson v. United States,* 283 F. 2d 636 (9th Cir. 1960); *Grantello v. United States,* 3 F. 2d 117, 121 (8th Cir. 1924); *Odom v. State,* 109 So. 2d 1963 (Fla. 1959). Where the defendant does not take the stand on his own behalf the prosecutor is not permitted under the Fifth Amendment to comment upon the failure of the accused to so testify. *Griffin v. California,* 380 U. S. 609, 85 S. Ct. 1229, 14 L. ed. 2d 106, reh. den. 381 U. S. 957, 85 S. Ct. 1797, 14 L. ed. 2d 730 (1965). Cf. § 918.09, Florida Statutes. We think that the determination by the

jury of the weight to be given to a confession is a collateral issue and such determination does not directly relate to the issue of guilt. Cf. *Simmons v. United States*, ____ U. S. ____, 88 S. Ct. ____, 19 L. ed. 2d 1247, 1257 (1968). Under these circumstances the prosecutor cannot draw unfavorable inferences from the failure of the accused to testify on the merits of the accusation.

A case closely in point is *Dyson v. United States*, 283 F. 2d 636 (9th Cir. 1960), cert. den. 366 U. S. 974 (1961), in which the Court held that by calling attention to his denials of guilt, the defendant had in effect waived his privilege against self-incrimination. *Dyson* is predicated upon *Diggs v. United States*, 22 F. 545 (242 U. S. 470) and *Carminetti v. United States*, *Id.* We think *Diggs* is not applicable here. The appellant testified to a collateral issue and not to the merits of the case as did Diggs.

Appellee also contends and the Court below found that appellant's testimony on the stand went beyond the issue of the voluntariness of his confession because appellant's answers to his attorney's questions on direct examination put before the jury his denial of his guilt of the crime. We do not agree with the District Court and appellee. We think that appellant did not exceed the proper bounds for obtaining a limited waiver. Even though appellant indicated several times that he had denied his guilt to the detectives, he did this only in the context of the alleged colloquy between Detective Troy and appellant which occurred immediately prior to the making of the confession. The assertion of innocence by the appellant was an integral part of his explanation of what occurred when the confession was elicited. Compare Circuit Judge Merrill's dissenting opinion in *Dyson, supra*, at 640. Appellant was not testifying to the

issue of his guilt or innocence. We think a distinction should be made between the accused denying his guilt by his own testimony from the stand and the accused calling attention to his denials of guilt in response to questions posed by his attorneys in relating the circumstances surrounding the making of the confession. If recitation to the jury of an initial denial of guilt to the detectives were to constitute a waiver of the "no comment" rule, then the jury would be denied the opportunity to hear all of the pertinent evidence and would thereby make its decision upon testimony more favorable to the prosecution.

That appellant took the stand for the sole purpose of testifying upon the credibility of the voluntariness of his confession should not be taken as a complete waiver of his constitutional privilege against self-incrimination. We find that the trial Court erred in permitting the prosecutor to comment adversely upon appellant's failure to testify on anything other than the voluntariness of his incriminating statements; therefore, we reverse the lower Court's ruling on this issue.

III.

Subsequent to the filing of briefs and oral argument, the Supreme Court decided *Witherspoon v. Illinois*,____ U. S.____ [No. 1015, June 3, 1968]. In *Witherspoon* the Supreme Court held "that a *sentence* of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction". *Supra*, at ____. (emphasis added) Though appellant makes no challenge to the exclusion of veniremen

from the jury who had scruples against capital punishment, we will proceed to determine the applicability of that decision to appellant's sentence in order to expedite disposition of the case *sub judice*. *Cf. Spencer v. Bevo* 398 F. 2d. 500 (5th Cir. 1968), ____ F. 2d ____ [No. 25548, July 18, 1968].

At the time of appellant's trial the trial Judge inquired as to those persons who had conscientious scruples such that they would not find a person guilty where the penalty was death.[4] Then he excused eleven jurors. Thus the Court excluded a sufficient number of veniremen with scruples against capital punishment so that the State would not have had enough peremptory challenges to remove all of the scrupled jurors from the panel had the Court not done so. All eleven jurors were excused "without any attempt to determine whether they could nonetheless return a verdict of death". *Witherspoon*, at ____. Under *Witherspoon* the death sentence cannot stand.

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[4]THE COURT: Ladies and Gentlemen of the Jury panel I would like to further inform you that in a case of this nature where the maximum penalty in the event the jury does not recommend mercy is death, the law requires that no person may be permitted to serve on a jury in a trial of this nature where the offense is punishable with death if he has conscientious scruples which would preclude him from finding any defendant guilty of an offense punishable with death. The reason for that is that if in your mind at the present time you have such conscientious scruples that you would not find a person guilty where the penalty is death under any circumstances then at this time you would not be permitted to serve on the jury. Now, let me ask the entire group of you and in asking that I will point out that those of you who indicate that you do at this time have such conscientious scruples which would preclude you from finding any defendant guilty of an offense punishable with death, I will then transfer you to another one of the judges who is trying civil cases where you will not be involved with that question.

Now, if any of you feel at the present time have such conscientious scruples that it would preclude you from finding any defendant guilty of an offense punishable with death, would you at this time please stand.

The denial of the petition for a writ of habeas corpus is REVERSED as to the judgment and sentence of death, and the case is REMANDED to the District Court with directions to the District Court to enter such orders as are appropriate to allow the State a reasonable time within which to grant appellant a new trial consistent with the foregoing decision and the principles of *Witherspoon*; otherwise appellant must be discharged.

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25284

FREDERICK KEITH CALLOWAY,

Appellant,

vs.

LOUIE L. WAINWRIGHT, Director,
Divisions of Corrections,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING
AND REHEARING EN BANC

(February 19, 1969)

Before BROWN, Chief Judge, *CLAYTON, Circuit Judge, and SCOTT, District Judge.

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*Judge Clayton, the third judge constituting the Court, did not participate in this decision to deny the petition for rehearing filed herein.

PER CURIAM: On petition for rehearing the appellee asks us to reconsider Division III of *Calloway v. Wainwright*, ____ F. 2d ____ (No. 25,284, December 20, 1968), and the application of *Witherspoon v. Illinois*, ____ U. S. ____ (No. 1015, June 3, 1968), thereto. In our original opinion we added as a third ground of error for consideration: Whether the trial court complied with the requirements of *Witherspoon v. Illinois*, ____ U. S. ____ (No. 1015, June 3, 1968).

We now wish to delete from *Calloway v. Wainwright*, ____ F. 2d ____ (No. 25,284, December 20, 1968), the last paragraph beginning on page 2, and Division III, and to substitute the following paragraph:

The denial of the petition for a writ of habeas corpus is REVERSED as to the judgment and sentence of death, and the case is REMANDED to the District Court with directions to the District Court to enter such orders as are appropriate to allow the State a reasonable time within which to grant appellant a new trial consistent with the foregoing decision; otherwise, appellant must be discharged.

The petition for rehearing is GRANTED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Local Fifth Circuit Rule 12), petition for rehearing en banc is DENIED.